

APPENDIX A

**IN THE SUPREME COURT OF FLORIDA
FRIDAY, OCTOBER 29, 1982**

CASE NO. 62,806

**District Court of Appeal,
5th District — No. 82-94**

GLEN E. SMITH, ETC.,

Petitioner,

vs.

ORANGE COUNTY, ETC., ET AL.,

Respondents.

It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and

the Declaration of Rights and Discretionary Jurisdiction
is hereby dismissed.

cc: Hon. Frank J. Habershaw,
Clerk
Hon. William D. Gorman, Clerk
Hon. Claude R. Edwards,
Judge
Byrd V. Duke, Jr., Esquire
James F. Page, Jr., Esquire
Herbert R. Swofford, Esquire

A True Copy
TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court
Swofford, Esquire

APPENDIX B

**[NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF]**

**IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1982**

CASE NO. 82-94

**THE STATE OF FLORIDA, on the
relation of GLEN E. SMITH, as trustee**
Appellant,

u

**ORANGE COUNTY, etc., ALLEN E. ARTHUR; LEE
CHIRA; DICK FISCHER; JACK MARTIN; and
LAMAR THOMAS, etc., FORD S. HAUSMAN, etc.,;
EARL K. WOOD, etc., and ANN ROSS, etc.,**
Appellees.

Decision filed September 29, 1982

**Appeal from the Circuit Court for Orange County,
Claude R. Edwards, Judge.**

Byrd V. Duke, Jr., North Miami, for Appellant.

**James F. Page, Jr., of Gray, Harris & Robinson, P.A.,
Orlando, for Appellees.**

PER CURIAM.

AFFIRMED.

**ORFINGER, CJ., DAUKSCH and UPCHURCH, F.,
JJ., concur.**

APPENDIX C

**IN THE CIRCUIT COURT, NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA**

CASE NO. 76-8768

**THE STATE OF FLORIDA, on the
relation of GLEN E. SMITH, as Trustee,**
Plaintiff,

vs.

**ORANGE COUNTY, a political subdivision
of the State of Florida, et al,**
Defendants,

vs.

ANN ROSS,
Intervenor and Class Representative.

**FINAL SUMMARY JUDGMENT
and
ORDER ON OTHER PENDING MATTERS**

THIS MATTER came before the Court upon the plaintiff's motion for summary judgment and also upon the motion of the defendants to add additional affirmative defenses and upon the motion of the intervenor, Ann Ross, to intervene. This case involves an action by the plaintiff to mandamus the defendant, Orange County, and the defendant-county officials to appraise, levy taxes on, and collect taxes from the property that comprised the presently abolished Town of Bithlo pursuant to the provisions of *Section 165.052, Fla. Stat. (1977)* in

order to satisfy a judgment, dated October 26, 1956, in the amount of \$126,790.24 plus costs of \$24.10, which the plaintiff recovered against the Town of Bithlo. Presently, there is due on such judgment an amount in excess of \$296,615.00. The Town of Bithlo was abolished in 1977 by *Chapter 77-502, Laws of Florida*. In addition to the 1956 suit, the plaintiff instituted a suit in 1973 to mandamus the then inactive Town of Bithlo and for other relief. Appellate proceedings involving that suit are reported in *Smith v. Bithlo*, 314 So.2d 212 (Fla. App. 4th 1975) and in *Smith v. Bithlo*, 344 So.2d 1288 (Fla. App. 4th 1977). The Court heard arguments of counsel and has reviewed the memoranda filed with the Court. It is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The Court has jurisdiction over the parties and of the subject matter.

2. The motion of the intervenor, Ann Ross, to intervene is granted subject to the provisions of *Rule 1.230, Fla. R. Civ. P.* which provides that the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

3. The defendants' motion to add additional affirmative defenses is granted.

4. The plaintiff's motion for summary judgment is granted since there is no genuine issue of material fact and the plaintiff is entitled to a summary judgment as a matter of law as stated hereinafter.

In this regard the Court holds that Orange County and its commissioners, under applicable state law, have a duty to levy taxes within the geographic limits of the abolished Town of Bithlo, which limits were specifically defined and set forth in its charter as Sections 21, 22, 27, and 28, all in Township 22 South, Range 32 East, Orange County, Florida, in order to pay its valid debts, which includes the judgment involved in this matter. See *Article 8, Section 2, Fla. Const.; Section 165.052, Fla. Stat. (1977); Section 165.071, Fla. Stat. (1977); Chapter 77-502, Laws of Florida*. The tax collector of Orange County has a legal duty to collect these taxes and the tax appraiser of Orange County has a legal duty to appraise the land which was included in the abolished Town of Bithlo. *Section 165.052, Fla. Stat. (1977)*.

As far as the purported defenses are concerned, the Court holds that such defenses are clearly without merit. The 1956 judgment entered against the Town of Bithlo is binding not only on it, but on every taxpayer and property owner of Bithlo regardless of whether such taxpayer and property owner acquired his land prior to or subsequent to the entry of the plaintiff's 1956 judgment against the Town of Bithlo. See *City of New Port Richey v. State et al. O'Malley*, 145 So.2d 903, at pages 905-906 and the authorities cited therein (Fla. App. 2nd 1962). Orange County and its officials now legally occupy the same position as the Town of Bithlo and its officials occupied in regard to the legal duty to levy and collect the necessary taxes from the property that was located in and comprised such town in order to satisfy the plaintiff's judgment.

The defendant's and the intervenor's defense or laches which is to the effect that the property owners

who acquired their property subsequent to the entry of such judgment are not bound by it, since it was not recorded in the public records and because a *lis pendens* was not filed in regard to the land located in the Town of Bithlo and to enforce this judgment against such property owners who purchased their property without knowledge of that judgment would cause a financial hardship on them, entirely misses the mark. Holders of unpaid municipal bonds and holders of judgments based upon unpaid municipal bonds have the right to compel the municipality to pay the bonded indebtedness. See *State ex rel. Gulf Life Ins. Co. v. City of Live Oak*, 170 So. 608, 609 and the authorities cited therein (Fla. 1936); *State ex rel. Babson v. City of Sebring*, 155 So. 669, 672 (Fla. 1934); *Brown-Crummer Inv. Co. v. Town of North Miami*, 11 F. Supp. 73, 77 (S.D. Fla. 1935). In other words, property located in a municipality, regardless of when its present owner acquired it, is subject to taxation to pay the municipality's legal debts. Hardship on property owners is not a legal defense to an action to enforce payment of legal municipal obligations; though hardship may be a factor the Court could consider in fashioning a remedy. See *North Miami, Florida v. Meredith*, 121 F.2d 279, 281-282 (5th Cir. 1941).

Further, neither the defendants nor the intervenors is in any position to raise such defense of laches. Orange County and the county officials legally occupy the position that the abolished Town of Bithlo and its officials occupied. In other words, the defendant, Orange County, and the defendant officials are identified with the Town of Bithlo and its officials in regard to the legal duty to levy and collect the necessary taxes to pay the plaintiffs judgment. The Town of Bithlo in the 1973 declaratory judgment

litigation never raised the defense of laches nor did it raise such defense in the earlier 1956 litigation in which the subject judgment was entered. This Court ruled in the 1973 litigation "that the Town of Bithlo owed the entire amount of plaintiff's judgment and had a legal duty to plaintiff to levy and collect the necessary taxes to pay the judgment." See *Smith v. Bithlo*, *supra*, 344 So.2d 1288. Since the Town of Bithlo never availed itself of any legal defenses, including the defense of laches, its people are now concluded. See *Young v. Miami Beach Improvement Co.*, 46 So.2d 26, 30 (Fla. 1950); *City of New Port Richey v. State ex rel. O'Malley*, *supra*, 145 So.2d 903, 905-906. Also, the defense of the statute of limitations is clearly without merit because the present action was filed well within the requisite twenty year period.

The Court also holds that *Section 165.052, Fla. Stat. (1977)* is constitutional and therefore the Court rejects the defendants' and intervenor's position that such statute is unconstitutional because it is an ex post facto law and tax. If anything, said *Section 165.052, Fla. Stat. (1977)* prevents the abolishment of the Town of Bithlo from impairing the obligation of contract in contravention of the applicable United States constitutional provision. Cf. *Brown-Crummer Inv. Co. Town of North Miami*, *supra*, 11 F.Supp. 73, at p.76.

5. Consequently, the Court holds that the plaintiff is entitled to a peremptory writ mandating that the defendant, Orange County, and the defendant, board of commissioners, levy and collect the taxes in regard to Sections 21, 22, and 28, Township 22 South, Range 32 East, Orange County, Florida, which comprised the

abolished Town of Bithlo, and to a writ mandating that the tax appraiser appraise such property and the tax collector collect the necessary taxes.

6. Therefore, Orange County, its Board of County Commissioners, the County Tax Appraiser and Tax Collector, shall within thirty days submit to the Court a proposed tax plan under which the subject judgment of \$126,790.24, together with costs of \$24.10, plus any and all accrued interest and any future interest can be satisfied in a period not to exceed ten years. A copy of this plan shall be served upon plaintiff's counsel and all other counsel of record. Upon receiving such plan or upon the expiration of such thirty day period, the plaintiff shall have thirty days to file any objections or amendments to the plan or his own plan and serve copies on all counsel. If the plaintiff does not file any amendments or objections or his own plan, the plan shall be deemed acceptable. However, the plaintiff either objects in whole or in part to the plan or offers any amendments to the plan or his own plan, the Court will consider this matter further and enter any other orders that may be necessary. If neither a plan nor an acceptable plan is filed with the Court, it may adopt its own plan.

7. The Court retains jurisdiction over the parties and of the subject matter to the full extent allowed by law to enter any further orders that may be necessary to effectuate this order of the Court.

DONE AND ORDERED in Chambers at the Orange County Courthouse, Orlando, Florida, this 25th day of April, 1979.

/s/ George N. Diemetre

CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail this 25th day of April, 1979, to Byrd V. Duke, Jr., Esquire, Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida 33161; Steven R. Bechtel, Esquire, Southeast National Bank Bldg., Suite 600, Orlando, Florida; James F. Page, Jr., Esquire, P.O. Box 30__ Orlando, Florida and to Herbert R. Swofford, Esquire, 1212 E. Colonial Drive, Orlando, Florida 32803.

/s/ Mertice E. Hand

Secretary to Circuit Judge

APPENDIX D

**[NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING PETITION, AND,
IF FILED, DISPOSED OF]**

**IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1980**

CASE NO. 79-1508/T4-648

**ORANGE COUNTY, a political subdivision
of the State of Florida,**

Appellant,

u

**THE STATE OF FLORIDA, on the relation
of GLEN E. SMITH, as Trustee, and ANN ROSS,**

Appellees.

Decision filed June 27, 1980

**Appeal from the Circuit Court for Orange County,
George N. Diamantis, Judge.**

**James F. Page, Jr. of Gray, Adams,
Harris & Robinson, P.A., Orlando, for Appellants.**

**Byrd V. Duke, Jr., North Miami, for Appellee,
Glen E. Smith.**

PER CURIAM.

AFFIRMED.

DAUKSCH, C.J., COBB and SHARP, W., JJ., concur.

APPENDIX E

**IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT**

JANUARY TERM 1981

CASE NO. 79-1508/T4-648

**ORANGE COUNTY, a political subdivision
of the State of Florida,**

Appellants,

u

**THE STATE OF FLORIDA, on the relation
of GLEN E. SMITH, as Trustee and ANN ROSS,**

Appellees.

Opinion filed February 25, 1981

**Appeal from the Circuit Court for Orange County,
George N. Diamantis, Judge.**

**James F. Page, Jr., of Gray, Adams, Harris &
Robinson, P. A., Orlando, for Appellants.**

**Byrd V. Duke, Jr., North Miami, for Appellee
Glen E. Smith.**

ON MOTION FOR REHEARING

SHARP, W., J.

The Motion for rehearing is granted because this court overlooked the fact, due to the voluminous record in this case and the inadequacy of the briefs, that the City of Bithlo was never defaulted in the prior litigation, and therefore the substituted party, Orange County, should not be foreclosed from raising the defense of laches.

The appellee filed suit in 1956 to recover the principal and interest due in improvement bonds issued by the City of Bithlo in 1924, and obtained a judgment. No action was taken to recover on the judgment until 1973, when suit was filed against Bithlo in case number 73-7910. This suit against Bithlo was "abated" for insufficiency of process. On appeal this judgment was reversed on other grounds.¹ After remand the trial court said Bithlo could not raise the defense of laches because it was "in default," although apparently no default was ever obtained against Bithlo. The trial court then abated the action as to Bithlo because there were no qualified persons who were willing to perform any governmental function connected with Bithlo. This judgment was also appealed.

While the appeal was pending the appellant brought suit for mandamus in an effort to compel Bithlo to levy taxes to pay the judgment. The trial court abated that suit until the appellate court rendered its decision in the case on appeal.

¹*Smith v. Bithlo*, 314 So.2d 212 (Fla. 3d DCA 1975).

The appellate court was informed that there were persons willing to serve on behalf of Bithlo. It stated that upon remand the trial court could determine the qualifications of these people and make the necessary appointments to represent the City of Bithlo.² There is no evidence in the record before us that anyone was ever so appointed or that this action was ever revived.

The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases. Orange County was substituted as Bithlo's "alter ego"³ and for the first time it sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.

Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense even if the doctrine of res judicata or collateral estoppel applied. *de Cancino v. Eastern Airlines, Inc.*, 283 So.2d 97 (Fla. 1973). However, since Bithlo was never actually defaulted, and both actions were "abated" as to it, res judicata

²Smith v. Bithlo, 344 So.2d 1288 (Fla. 4th DCA 1977).

³Ch. 77-502, Laws of Florida.

should not apply in any event. *Burleigh House Condominium, Inc. v. Buchwald*, 368 So.2d 1316 (Fla. 3d DCA), *cert. denied* 379 So.2d 203 (1979); *Donaldson Engineering, Inc. v. City of Plantation*, 326 So.2d 209 (Fla. 4th DCA 1976). The summary judgment appealed is reversed in so far as it forecloses the right of Orange County to plead and attempt to prove the defense of laches. This matter is remanded to the trial court to permit the appellants to file an answer and any affirmative defenses available to it.

REVERSED and REMANDED.

DAUKSCH, CJ. and COBB, J., concur.

APPENDIX F

[FILED Jan 14, 1974]

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT OF FLORIDA
ORANGE COUNTY, FLORIDA**

Case No. 73-7910

Glen E. Smith, as trustee

Plaintiff,

u

The Town of Bithlo, et al

Defendant

Date: Jan. 14, 1974

ENTRY FOR DEFAULT

It appearing that: The Town of Bithlo defendant(s) in the above entitled suit has been duly served according to law, and said Defendant(s) having failed to file or serve any paper in the action, a default is hereby entered against said defendant(s).

RANDALL P. KIRKLAND
Clerk of Circuit Court

By /s/ Betty Andrews
As Deputy Clerk

APPENDIX G

**[NOT FINAL UNTIL THE TIME EXPIRES
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IF FILED, DISPOSED OF]**

**IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1980**

CASE NO. 79-1508/T4-648

**ORANGE COUNTY, a political subdivision
of the State of Florida,**

Appellant,

u

**THE STATE OF FLORIDA, on the relation
of GLEN E. SMITH, as Trustee, and ANN ROSS,**

Appellees.

Decision filed June 27, 1980

**Appeal from the Circuit Court for Orange County,
George N. Diamantis, Judge.**

**James F. Page, Jr. of Gray, Adams,
Harris & Robinson, P.A., Orlando, for Appellants.**